

# SCCDA Policy and Procedure Manual



CALIFORNIA  
DISTRICT  
ATTORNEYS  
ASSOCIATION

## PROFESSIONALISM

*A Sourcebook of Ethics and Civil Liability  
Principles for Prosecutors*

# SCCDA Policy and Procedure Manual

## Article I

## AN INTRODUCTION TO THE OFFICE

### Section 1.02

### Purpose and Source of Manual

The purpose of this manual is to ensure uniform and fair treatment of all employees and consistency in the administration of justice in all matters handled by this office. It is important that we set impressive standards as a law office representing the people of the State of California and the County of Santa Clara.

Employees of the district attorney's office must demonstrate a clear understanding of the standards of conduct required of those who hold the public trust. Although this manual is not a comprehensive review of appropriate behavior in all circumstances, it is an overview of some of the most important principles that support the way we operate. It is by following these principles that we promote an environment of mutual trust and respect and create a law office that best serves the people we represent.

Because we represent the public, the tone of many of the policies and guidelines require strict adherence with little, if any, deviation from required conduct. Therefore, whatever the employee's position, s/he has an important assignment: performance of every task to the best of his or her ability. High performance by every employee results in better service to the public and personal satisfaction for the employee.

Generally, these policies apply to every district attorney's office employee. Specific policies and guidelines are applicable to attorneys only by virtue of their status as officers of the court and licensees of the State of California. Those sections are apparent by title and content. See [Mandatory Reading](#) on the Index page.

All attorneys and paralegals in the criminal division are required to read the entire manual. Investigators in the bureau of investigation, staff members in legal support operations and business services areas of the criminal division, attorneys and staff members in the family support division, and staff in the crime laboratory are required to read those sections delineated in [section 1.04](#) (Use of the Manual). If you have questions concerning the content of the policy and procedures manual or other aspects of your employment with the district attorney's office, you are encouraged to contact your immediate supervisor (non-attorney employees), your assistant district attorney, or the chief assistant district attorney.

All attorneys employed by this office will be guided by the California Rules of Professional Conduct, office procedural memoranda, the State Bar Act in Business and Professions Code sections 6000-6228, CDAA's *"Professionalism, Sourcebook on Ethics and Civil Liability"*, and case law determinative of liability for failure to adhere to professional conduct rules. State, county and federal law applicable to the workplace is also a source of some of the policies in this manual.

All other employees, whether members of Local 521 (Legacy Local 715) or sworn peace officers, will be guided by applicable portions of this manual, any applicable contract with the County and California law controlling specific conduct.

Most, if not all of the procedural rules cited in this manual are found in the California Penal Code, Business and Professions Code, Government Code, Welfare and Institutions Code, California Rules of Court, the California Constitution, and other applicable criminal and civil law statutes.

# SCCDA Policy and Procedure Manual

## Section 2.03 Ethics Advisor



### Article II

### DISTRICT ATTORNEY'S DUTIES

#### Section 2.03

#### Ethics Advisor

#### Policy

The District Attorney's Office is committed to ethical and professional conduct. Attorneys are encouraged to confer with their supervisor and/or our Ethics Advisor in any matter involving ethical considerations that they cannot resolve to their own satisfaction.

The District Attorney has designated one deputy district attorney as Ethics Advisor to attorneys. The Ethics Advisor is not part of the executive management team and will not report attorneys or occurrences to management without exceptional circumstance.

The desktop resource [SCCDA Ethics Home Page](#) contains Exemplary Prosecutor Bulletins, SCCBA Code of Professionalism, State Bar of California Rules of Professional Conduct, CALBAR Ethics Information, [CDAA Professionalism Manual](#), Ethics in Opening and Closing Argument as well as other useful resources. This collection of resources is intended to assist attorneys and staff in finding the answers to ethical issues which arise in our work.

Conferring with the Ethics Advisor and using other Office resources does not relieve attorneys of their duty to properly discharge their ethical and legal obligations.



## Section 5.01(a)(iv) Witness/Victim Contact



### Article V

### EMPLOYEE OBLIGATIONS

#### Section 5.01(a)(iv)

#### Witness/Victim Contact

##### Policy

Victims and witnesses of crimes shall be treated with courtesy, honesty, compassion, and dignity. As with all members of the public, telephone calls shall be returned as soon as reasonably possible if the attorney is in trial, on vacation or sick leave, and within one working day under most other circumstances. [\[1\]](#)

Failure to contact a victim or witness is a failure to represent adequately the public we serve. Employees should use common sense to separate the harassing member of the public from a victim or witness who is calling concerning the progress of a case. (See [section 5.01\(a\)\(iv\)1](#)) regarding notification to victims and witnesses of dispositions in criminal cases. Familiarity with the *Victims Rights Manual* is required. Contact the assistant district attorney in charge of training if you have not received a copy of the manual.

##### Limitations on Contact with Victims or Witnesses

###### 1. Requests by defense to interview a victim or witness.

A prosecutor shall not directly or indirectly advise a witness against speaking with the investigator or attorney for the defense or to make himself or herself unavailable for subpoena. ([Rules of Professional Conduct, Rule 5-310](#)) A prosecutor may tell a witness that s/he has rights regarding an interview. ("A criminal defendant does not have a fundamental due process right to pretrial interviews or depositions." (*People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523, 530-531.)

Where the safety of the victim or witness is an issue, the prosecutor may refuse to reveal witness identifiers and seek an order of the court to protect the witness. [Protective Order Procedure Memo](#), see also [Penal Code section 136.2](#) and [section 5.01\(a\)\(iv\)3](#) (Discovery of Witness Identifiers)

However, where the safety of the victim or witness is *not* at issue, the defense attorney is entitled to contact the victim or witness of a crime directly to request an interview. (*Reid v. Superior Court* (1997) 55 Cal App.4th 1326.) "The names and addresses of sexual assault victims must be disclosed to the defendant in a criminal case regardless of other statutory provisions that protect sexual assault victims from unwanted publicity and, in the absence of a showing of good cause as defined in [\[Penal Code\] section 1054.7](#) or actual harassment as discussed in [\[Penal Code\] section 1054, subdivision \(d\)](#), the defense cannot be prohibited from directly contacting those victims." (*Id.*, at 1338.)

A victim or witness is entitled to be shown proper identification before consenting to an interview with any party. ([Penal Code section 1054.8](#)) Failure to comply with the provisions of section 1054.8 can lead to sanctions under section 1054.5 A victim or a witness is entitled to have another person present while being interviewed.

The victim of a sexual assault can protect his or her name and address from becoming a public record pursuant to [Penal Code section 293](#) by requesting that the information be withheld under [Government Code section 6254, subdivision \(f\)\(2\)](#). Please note that section 293 does not preclude disclosure where required by law, i.e. [Penal Code section 1054.1, Confidential Information Filed with the Court](#)

For all victims of crime, see Penal Code sections [841.5](#) and [1054.2](#). (No attorney may disclose or permit the disclosure to a defendant, defendant's family members, or others, a victim's or witness' address or telephone number if that name, address or telephone number has been provided under Penal Code section 1054.1. Willful disclosure by the attorney or others listed is a misdemeanor)

###### 2. Communications with Represented (Witnesses) Parties.

See [section 5.01\(b\)\(ii\)3](#) for policy regarding this issue.

Attorneys should review Chapter VI of *Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors* for an excellent discussion of communications with represented witnesses, informants, and defendants. Chapter six of the CDAA publication was written by attorneys in the Santa Clara County District Attorney's Office.

###### 3. Victim's Request for Certification of Helpfulness pursuant to Victims of Trafficking and Violence Prevention Act of 2000 (U Visa Certification).

In order to comply with federal guidelines, and as part of our broader efforts to ensure that victims of crime report their victimization to law enforcement regardless of immigration status, we review requests for the certification of "helpfulness" of victims in their applications for "U-Visas" pursuant to the federal Victims of Trafficking and Violence Prevention Act of 2000.



# SCCDA Policy and Procedure Manual

## Section 5.01(a)(iv)2) Duty to Warn



### Article V

### EMPLOYEE OBLIGATIONS

#### Section 5.01(a)(iv)2)

#### Duty to Warn

##### Policy and Law

As a rule, attorneys should avoid offering safety assurances or making security promises to a victim or a witness in a criminal matter. However, assistance in obtaining a restraining or stay away order, an order revoking or increasing bail, a request for extra patrols or other assistance from the police department may be offered. [Protective Order Procedure Memo](#) (See [Penal Code section 136.2](#).)

The role of a prosecutor committed to serving the public is exemplified in the charging decision, thorough preparation for trial, advocacy in trial and at the sentencing hearing. While you are encouraged to feel compassion for a victim of crime, avoid words or conduct that may cause the victim to rely on your promises to his or her detriment. See [section 5.01\(a\)\(iv\)3](#)) (Discovery of Witness Identifiers)

The attorney should discuss the issue of a victim's or witness' safety with his or her assistant district attorney. The assistant will determine whether an application for the California Witness Protection Program (CWPP) will be made based upon all available facts and circumstances.

##### Potential Liability Issues

Law enforcement officers and public officials may have a duty to warn and a duty to protect a victim or witness when, a "special relationship" is created between the victim/witness and the law enforcement officer or public official. "[W]hen the government's actions create a foreseeable peril to a specific foreseeable victim, a duty to warn arises when the danger is not readily discoverable by the endangered person." (*Wallace v. City of Los Angeles* (1993) 12 Cal.App.4th 1385,1396; *Carpenter v. City of Los Angeles* (1991) 230 Cal.App.3d 923; *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425.)

The issues surrounding a duty to warn, a special relationship resulting in liability and prosecutorial immunity must be evaluated separately in order to properly delineate attorney conduct. (*Falls v. Superior Court (Samaniego)* (1996) 46 Cal.App.4th 1031.)

A "special relationship" resulting in liability may be created when a law enforcement officer (or an attorney) makes statements minimizing any actual danger to a victim/witness and thereafter fails to warn the witness of a known danger to his or her life. (*Carpenter v. City of Los Angeles, supra*, 230 Cal.App.3d at p. 931, *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1501-1502.)

However, even where a breach of a duty to warn is found, a prosecutor performing an act in his or her official capacity which is an integral part of the *judicial process or proceedings* does so with *absolute prosecutorial* (quasi-judicial) immunity from civil liability. (*Burns v. Reed* (1991) 500 U.S. 478, 486 [114 L.Ed.2d 547]; *Imbler v. Pachtman* (1976) 424 U.S. 409, 430 [47 L.Ed.2d 128, 136].)

Interviewing a witness in preparation for a preliminary hearing, trial or other hearing is such an act. (*Falls, supra*, at p. 1044-1045.) Absolute prosecutorial immunity from civil suit is available only "for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." (*Burns v. Reed, supra*, 500 U.S. at p. 486.) Promising a witness' safety at the *investigative stage* of a prosecution affords the deputy district attorney, at best, *qualified immunity*. (*Id.*, 487.)

Attorneys should review relevant case law and Chapters III and IV of *Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors*. If you do not have a copy, contact the assistant district attorney in charge of training.



# SCCDA Policy and Procedure Manual

## Section 5.01(b)(ii) Rules of Professional Conduct of the State Bar of California

### Article V

### EMPLOYEE OBLIGATIONS

#### Section 5.01(b)(ii)

#### Rules of Professional Conduct of the State Bar of California

#### Policy

All attorneys should be familiar with the Rules of Professional Conduct of the State Bar of California, the [State Bar Act](#), ([Business and Professions Code section 6068](#)), and [Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors](#), published by CDAA. Familiarity with the Rules of Professional Conduct and the State Bar Act is mandatory. The Rules are listed below, however those that are most likely to govern the conduct of prosecutors are *hyperlinked* [blue lettering]. A full set of rules may be found in the library, or on the State Bar of California's Web Site on the Internet. [www.calbar.ca.gov](http://www.calbar.ca.gov) (Left side, click "Ethics", then "Rules of Professional Conduct.")

#### RULES OF PROFESSIONAL CONDUCT

##### Chapter 1. Professional Integrity in General

- [Rule 1-100](#). Rules of Professional Conduct, in General
- [Rule 1-110](#). Disciplinary Authority of the State Bar
- [Rule 1-120](#). Assisting, Soliciting, or Inducing Violations
- [Rule 1-200](#). False Statement Regarding Admission to the State Bar
- [Rule 1-300](#). Unauthorized Practice of Law
- Rule 1-310. Forming a Partnership with a Non-Lawyer
- [Rule 1-311](#). Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
- Rule 1-320. Financial Arrangements with Non-Lawyers
- Rule 1-400. Advertising and Solicitation
- Rule 1-500. Agreements Restricting a Member's Practice
- [Rule 1-600](#). Legal Service Programs
- [Rule 1-700](#). Member as Candidate for Judicial Office
- [Rule 1-710](#). Member as Temporary Judge, Referee or Court-Appointed Arbitrator

##### Chapter 2. Relationship among Members

- [Rule 2-100](#). Communication with a Represented Party
- Rule 2-200. Financial Arrangements among Lawyers
- Rule 2-300. Sale or Purchase of a Law Practice of a Member, Living or Deceased
- [Rule 2-400](#). Prohibited Discriminatory Conduct in a Law Practice

##### Chapter 3. Professional Relationship with Clients

# SCCDA Policy and Procedure Manual

## Section 5.01(b)(ii)3) Communication with Represented Party

### Article V

### EMPLOYEE OBLIGATIONS

#### Section 5.01(b)(ii)3)

#### Communication with Represented Party

##### Policy and Law

##### Post-Charging Contact with a Represented Defendant

Prosecuting attorneys contacted by a represented party *after charges have been filed* should not talk with the party concerning the subject of that representation without the permission of the party's attorney (Professional Rules of Conduct, Rule 2-100) This includes contact initiated by a defendant [1] who is represented by counsel United States v. Lopez (9th Cir. 1993) 989 F.2d 1032. "The prosecutor's ethical duty to refrain from contacting represented defendants intensifies upon indictment for the same reasons that the Sixth Amendment right to counsel attaches" (*Id.* at p. 1038)[2], emphasis added.)

Attorneys (and investigators) should not *initiate contact* with a "party" known to be represented by counsel in a *pending* case. Prosecutor or police officer (investigator) *initiated* contact with a represented party can result in State Bar disciplinary action, a contempt citation, suppression of evidence and dismissal of the charges (People v. Hayes (1988) 200 Cal App 3d 400, 412.)

##### Pre-Charging Contact with a Defendant

For pre-charging interviews with a "party" the rules differ (Attorney General Opinion 91-1205 (75 Ops. A.G. 223); Kain v. Municipal Court (1982) 130 Cal App 3d 499; U.S. v. Lopez, supra, 989 F.2d 1032.)

An attorney must consult with his or her assistant district attorney *before* speaking with a represented party if s/he has any doubt as to the legality of questioning a represented party.

##### Potential Liability Issues

Communication with a represented defendant may result in dismissal of the People's case, contempt of court, State Bar sanctions and discipline by this office (Rules of Professional Conduct, Rule 1-100). Attorneys are advised to review the following cases carefully (Boulas v. Superior (1986) 188 Cal App 3d 422 [Interference with the attorney-client privilege]; U.S. v. Lopez, supra, 989 F.2d 1032; People v. Hayes, supra, 200 Cal App 3d 400, 412-413.)

[1] It may also include a victim or a witness charged as a defendant in another matter and represented by counsel in that matter.

[2] Attorneys should review Chapter VI of *Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors* for an excellent discussion of communications with represented parties, (witnesses, informants, and defendants). Chapter six of the CDAA publication was written by attorneys in the Santa Clara County District Attorney's Office.



# SCCDA Policy and Procedure Manual

## Section 5.01(b)(iii)2) Professionalism and Respect for Co-Workers

### Article V

### EMPLOYEE OBLIGATIONS

#### Section 5.01(b)(iii)2)

#### Professionalism and Respect for Co-Workers

##### Policy

A prosecutor's conduct with fellow employees should be characterized by courtesy, respect and professional integrity. This includes respecting the privacy and personal rights of every employee.

All employees should comport themselves both in the office, while conducting office business, and while off duty in a manner consistent with their positions as public employees. ( [County Code of Ethical Conduct](#) )

A prosecutor is held to a higher standard of appropriate conduct because of the unique function s/he performs in representing the interests, and in exercising the sovereign power of the state. (*People v. Kelley* (1977) 75 Cal.App.3d 672, 690 ) To this end, compliance with the [Rules of Professional Conduct](#), and [Business and Professions Code section 6068](#) is required. *Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors*, published by the California District Attorneys Association, should be used as a guide.

Harassment, violence, dishonesty, the use of illegal drugs, or the abuse of prescription and other legal drugs, or alcohol will not be tolerated. As in the case of other violations of county or office rules, policies and procedures, behavior of this nature shall be grounds for discipline up to and including dismissal under applicable policies, ordinance codes, and labor agreements. (See County [Merit System Conduct Rules](#); and sections [4.02\(b\)](#), [4.02\(d\)](#), and [4.02\(e\)](#) of this manual, (District Attorney Employment Policies).)

Each employee is required to read and observe those portions of the Policy and Procedures Manual applicable to his or her position. (See [section 1.04](#), (Use of Manual).)

[Honesty Memorandum](#)

[The Law Abiding Prosecutor](#)

[Handling Personal Cases](#)



# SCCDA Policy and Procedure Manual

## Section 5.01(b)(iii)5) Conduction Investigations and Interviews

### Article V

### EMPLOYEE OBLIGATIONS

#### Section 5.01(b)(iii)5)

#### Conducting Investigations and Interviews

##### Policy

Interviewing witnesses is a critical component of thorough trial preparation. Interviews should be conducted in a manner to avoid suggesting answers to the witness. Ask non-leading questions. The full name, including middle name, date of birth, address, telephone number, and occupation should be obtained at the outset from each witness. The witness should be questioned exhaustively about his or her personal observations and knowledge of the facts in dispute. Every effort should be made to determine exactly what the witness remembers. Care should be exercised to avoid forcing, even inadvertently, the witness's recollection to parallel that of the complainant or of any other witness. Do not show a witness the statements of other witnesses in a matter unless the witness is an expert and the information is needed as a basis for his or her opinion. The decision to share a witness' prior written or taped statement during the interview in preparation for hearing or trial is a matter of tactics. Inexperienced trial attorneys should discuss the matter with their team leader and assistant district attorney.

A witness must always be encouraged to tell the truth, respect the court, report any threats to his or her safety and to stay in contact with the deputy district attorney during the pendency of the case. If the witness is to be served with a subpoena, time will be saved by having an investigator or police officer serve it at the time of the trial preparation interview.

The disclosure of new evidence or inconsistencies with prior statements during the interview must be given as discovery to the defense counsel as soon as possible. (See, [section 5.02\(a\)\(ii\)](#), (Discovery Policy) and [section 5.02\(b\)\(ii\)1](#), (CRIMES Use and Procedure) )

##### Potential Liability Issues

A deputy district attorney ordinarily should not interview a prospective witness except in the presence of a third person to avoid the possibility of becoming a witness in a jury trial where the deputy is the advocate<sup>[1]</sup> (See [section 5.01\(b\)\(ii\)1](#), (Prosecutor as a Witness) ) A prosecutor should *not* interview a represented party<sup>[2]</sup> without the permission of the party's attorney (California Rules of Professional Conduct, Rule 2-100; see [section 5.01\(b\)\(ii\)3](#), (Communication with Represented Party) )

Discuss doubts regarding the legality of a proposed interview with an assistant district attorney before the interview. A thorough research of existing authorities before the discussion is recommended.

<sup>[1]</sup> In some cases, particularly a misdemeanor case where an investigator or the police officer is less likely to be available, the attorney should consider tape recording the interview of a witness. See Penal Code section 633.

<sup>[2]</sup> For a complete definition of "party" as used in this context attorneys should review Chapter VI, pg. 2-6 of *Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors*. Attorneys in the Santa Clara County District Attorney's Office wrote chapter six of this CDAA publication.



# SCCDA Policy and Procedure Manual

## Section 5.01(b)(iv)4a) Handling Personal, Friend's, or Relative's Case



### Article V

### EMPLOYEE OBLIGATIONS

#### Section 5.01(b)(iv)4a)

#### Handling Personal, Friend's, or Relative's Case

### Policy

#### 1. Handling Personal Cases

All attorneys are required to be familiar with the [Rules of Professional Conduct](#), the [State Bar Act](#), ([Business and Professions Code section 6068](#)), and *Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors*, published by the CDAA.

An attorney will not handle a case where s/he is in a traffic court except by appearance in open court *in propria persona*. Personal court appearances are to be made on previously approved STO or vacation time. This policy specifically applies to the handling of parking and traffic tickets.

An attorney in this office shall not contact a judge or commissioner out of court regarding a personal citation or any other citation. If you must appear *in propria persona*, do not identify yourself in any way as a Santa Clara County prosecutor. (See, [section 5.01\(b\)\(ii\)6](#), (Use of Office Identification, Insignia or Letterhead).)

Legitimate traffic and parking citations should be paid promptly. If you desire time off to appear on a personal case, apply for vacation or STO through the normal procedure. (See, [sections 5.01\(b\)\(iv\)4](#), (Reporting Responsibility/Criminal Activity); [5.01\(b\)\(ii\)1](#), (The Prosecutor as a Witness).)

#### 2. Having Contact with a Friend's or Relative's Case

A prosecutor may not practice as a criminal defense attorney in any county whether the prosecutor is working full time or on leave of absence. ([Government Code section 26540](#).) Aside from representing oneself, a deputy district attorney is not permitted to defend or assist in the defense of anyone accused of a felony, misdemeanor, or traffic infraction. Furthermore, a prosecutor must avoid becoming involved in a friend, a family member, or loved one's criminal matter at any stage of a criminal investigation or proceeding (including juvenile matters). A mere discussion of legal strategy, applicable law, and associated topics is prohibited.

An attorney or staff member of the District Attorney's office shall *not* handle any case where either the victim/complainant or the defendant is a friend or relative. If the **attorney** first discovers upon reading a case that the defendant or the victim is either a friend or relative, s/he shall notify the Chief Assistant District Attorney in writing (memo or e-mail) no later than the next working day after acquiring knowledge of this circumstance. If a **non-attorney employee** first discovers upon reading a case that the defendant or the victim is either a friend or relative, s/he shall notify his/her supervisor **and** the Chief Assistant District Attorney in writing (memo or e-mail) no later than the next working day after acquiring knowledge of this circumstance. The case will be reassigned. The attorney or staff member should not thereafter read the file, or review the case in CIBERLaw, CJIC, or CLETS. (See [section 5.01\(b\)\(ii\)2](#) (Conflict of Interest/Motion to Recuse DA).)

#### Potential Liability

The unauthorized use of CIBERLaw, CJIC, CLETS, or other summary criminal history information will subject an employee to discipline up to and including termination of employment. (See, [sections 5.01\(b\)\(iii\)6](#), (Use of Criminal Offender Info.); [5.02\(a\)\(ii\)4](#), (Release of Criminal Offender Information).)

#### 3. Personal Civil Cases



# SCCDA Policy and Procedure Manual

## Section 5.02(a)(ii) Discovery Policy

### Article V

### PROCEDURAL RESPONSIBILITIES

#### Section 5.02(a)(ii)

#### Discovery Policy

##### Policy and the Law

By policy, this office provides a defendant with early and complete discovery of all matters regarding the charged criminal action. [Penal Code section 1054.1](#) requires the prosecuting attorney to disclose "the names and addresses of persons the prosecutor intends to call as witnesses at trial, [1] statements of all defendants, all relevant real evidence seized or obtained as a part of the investigation of the offenses charged, the existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial, any exculpatory evidence (*Brady v Maryland* evidence), relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial." (See [Izazaga v. Superior Court \(1991\) 54 Cal 3d 356](#); [section 5.02\(a\)\(ii\)1a](#)). (Reciprocal Discovery); see, also [section 5.02\(b\)\(ii\)1](#). (CiberLaw Use and Procedure) )

##### Use of Email to Provide Discovery Prohibited

As a matter of policy, **never** use Email, either as text or an attachment, to provide defense discovery and investigative reports. This policy applies as to the Public Defender and Alternative Defender Offices as well as private counsel. Since much of our discovery contains material not in the public record and potentially dangerous to others, we will not rely on any protocol which purports to protect Email from the view of others. [Discovery and Email Transmission—Prohibition Memo](#)

Prior to preliminary examination, discovery is the responsibility of the preliminary examinations team unless the case is assigned to a vertical prosecutions team. In that case, discovery is the responsibility of the attorney assigned to the case. After preliminary hearing, discovery is the responsibility of the trial attorney.

Attorneys should carefully review, Chapters III-14 and V of *Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors*, published by the CDAA, and *California Criminal Discovery*, by Pipes and Gagen, published by Lexis Law Publishing, for a more detailed discussion of the law regarding the prosecutor's ethical duty regarding discovery.

# SCCDA Policy and Procedure Manual

## Section 5.02(a)(ii)2) Brady v. Maryland (Exculpatory) Evidence



### Article V

### PROCEDURAL RESPONSIBILITIES

#### Section 5.02(a)(ii)2)

#### Brady v. Maryland (Exculpatory) Evidence

##### Policy and Law

Every prosecutor has a duty to disclose exculpatory evidence *known* to the attorney or *others on the prosecution team*. The prosecution team includes the investigating law enforcement agency(ies), the crime laboratory, expert witnesses or any other person or organization who has assisted in the investigation of the case. (*Brady v. Maryland* (U.S.Md. 1963) 373 U.S. 83, 87, [83 S.Ct. 1194.]; *Kyles v. Whitley* (U.S. La. 1995) 514 U.S. 419, 437, [115 S.Ct. 1555.]; *In Re Brown* (1980) 17 Cal.4th 873, and Penal Code section 1054.1(e); see *California Criminal Discovery* by Pipes and Gagen, published by Lexis Law Publishing for a more detailed discussion of Brady evidence.)

Evidence that is favorable to the defendant, (harmful to the prosecution's case, or impeaches or tends to impeach the credibility of a prosecution witness), material and in the possession of the prosecution team is exculpatory evidence. (*Kyles v. Whitley*, *supra*, 514 U.S. 419, 433-434[1]; see, [section 5.02\(b\)\(ii\)1](#)), (CRIMES Use and Procedure))

The individual prosecutor has a duty to *learn* of any favorable evidence known to the others acting on the government's behalf in the case, including the police. "[W]hether the prosecutor succeeds or fails in meeting this obligation ... the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." (*Kyles v. Whitley*, *supra*, 514 U.S. 419, 437-438; see [section 5.02\(a\)\(ii\)2a](#)), (Duty Re Victim/Witness Criminal History).)

##### Potential Liability Issues

All the remedies of [Penal Code section 1054.5 \(b\)](#) are available to the court where the prosecutor (or defense attorney) fails to disclose exculpatory evidence. In the most egregious cases, "any other lawful order" may include dismissal of the People's case.

While a deputy district attorney may have absolute immunity from a Civil lawsuit for *willful failure* to disclose exculpatory evidence, s/he is subject to contempt, suspension, and possible disbarment for such conduct ( in addition to disciplinary action by this office. ([Penal Code section 1054.5\(b\)](#), [Business and Professions Code section 6103](#), [Rules of Professional Conduct, Rule 1-100](#).)

[1] [A] defendant need not establish that the [prosecuting] attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*. *Bagley's* touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial. (*Kyles*, *supra*, 514 U.S. at p. 434.)

[2] Attorneys should review Chapter V of *Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors* for an excellent discussion of discovery rules and the prosecutor's duty regarding exculpatory evidence in particular.



# SCCDA Policy and Procedure Manual

## Section 5.02(a)(iii) Immunity Agreements

### Article V

### PROCEDURAL RESPONSIBILITIES

#### Section 5.02(a)(iii)

#### Immunity Agreements

##### Policy

An attorney shall discuss any offer of immunity with his or her assistant district attorney. In some cases there will be further discussion with the district attorney or the chief assistant district attorney. Attorneys shall not offer or allow investigating law enforcement officers to offer immunity to a witness in exchange for informant duties without the approval of an assistant district attorney or the chief assistant district attorney. For purposes of this policy, immunity includes an offer to an informant to take no action on a pending (including an as yet uncharged) case.

Immunity is a very complicated area of the criminal law. Its proper and sparing use can promote justice. Improper use and overuse prompts distrust in government and our system of justice. The prosecutor has inherent power to offer general or limited immunity. (*People v. Superior Court (Crook)* (1978) 83 Cal App 3d 335.) This power is apart from that set forth in [Penal Code section 1324](#) and [1324.1](#). The grant of immunity for a deponent or witness or party in a civil proceeding is an example of this inherent power. (See *Daly v. Superior Court* (1977) 19 Cal 3d 132.) Pre-filing immunity involving a negotiated grant of immunity is another. Any offer of immunity must be carefully drafted. Simple mistakes in the drafting of an immunity agreement can result in the dismissal of an action. (See *People v. Quatermain* (1997) 16 Cal 4th 600, [breach of promise to not use pretrial statements].)

The public rarely looks with favor upon immunized testimony, particularly of a witness who is actually an accomplice of the accused or a jailhouse informant. Offers of immunity are therefore generally reserved for those cases where the crime was violent or had the potential to cause death and the accused is highly dangerous to the public and his or her conviction is dependent upon immunized testimony. (See [section 5.03\(c\)](#), (Confidential Informant); [Penal Code section 1127a](#), (Jailhouse Informant); [Penal Code section 1191.25](#), (In-Custody Informant, Notification to Victim of Bargain).)

##### Discovery

A copy of the written grant of immunity for a witness who is expected to be called to testify will be supplied to counsel for the defendant as a part of discovery. This will be provided in compliance with discovery statutes. Failure to provide discovery of a grant of immunity or any other promise made or consideration given by a member of the prosecution team to a witness can result in dismissal of charges and State Bar sanctions against the prosecutor. (See [Penal Code section 1127a\(c\)](#), [Penal Code section 1054.5\(b\)](#).)

##### Safety and Security Considerations

If both the defendant and the immunized witness are in custody, the prosecutor should advise the case investigator to inform the jail to allow corrections officials to investigate the security implications and provide for the safety of the prisoners.

##### Potential Liability Issues

All the remedies of [Penal Code section 1054.5\(b\)](#) are available to the court where the prosecutor (or the defense attorney) fails to comply with discovery. In the most egregious cases, "any other lawful order" may include dismissal of the People's case. While a deputy district attorney may have absolute immunity for willful failure to disclose exculpatory evidence, s/he is subject to contempt, suspension, and possible disbarment for such conduct. ([Penal Code section 1054.5\(b\)](#); [Rules of Professional Conduct, Rule 1-100](#).)

Attorneys should review [Chapter VII \(Immunity for Testimony\)](#) of *Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors*, and the case law cited within that chapter. Contact the secretary for the assistant district attorney in charge of Training and Staff Development for a copy.

Volume XIX, No. 4, 1997 edition of *Prosecutor's Brief*, also published by the California District Attorneys Association, contains a well written article regarding [Penal Code section 1324](#) and the new use immunity under that statute as amended.



# SCCDA Policy and Procedure Manual

## Section 5.02(b)(ix) Grand Jury



### Article V

### PROCEDURAL RESPONSIBILITIES

#### Section 5.02(b)(ix)

#### Grand Jury

#### Policy and Law Functions

The functions of the grand jury are outlined in the Penal Code sections 888 through 945. The District Attorney is the legal advisor to the grand jury. ([Government Code section 26501](#) and [Penal Code section 935](#)) In Santa Clara County, the grand jury consists of nineteen members. (Penal Code section 888.2) It is authorized to inquire into the commission of public offenses ([Penal Code section 917](#)), willful or corrupt misconduct of public officers ([Penal Code section 919\(c\)](#)), the needs of all Santa Clara County officers, including the method of performing duties ([Penal Code section 928](#)), and may order the District Attorney to sue to recover money due the county. ([Penal Code section 932](#).)

The District Attorney may at all times appear before the grand jury for the purpose of giving information or advice or to interrogate witnesses whenever s/he thinks it is necessary. ([Penal Code section 935](#)) In cases that affect the general public welfare, the grand jury, acting through its foreman and the Attorney General or the District Attorney, may make a joint written request for public sessions. ([Penal Code section 939.1](#).)

The grand jury may receive only legally admissible evidence. ([Penal Code section 939.6](#)) The standard of proof required to support an indictment by a grand jury is probable cause - the "grand jury serves as part of the charging process of criminal procedure..." (*Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1026.) (Interpreting language in [Penal Code section 939.8](#)) Concurrence of twelve grand jurors is necessary to "find" an indictment. ([Penal Code section 940](#)) This latter fact should be kept in mind when less than the full grand jury can be present during the presentation of a criminal matter. After indictment, priors may be added by amendment without further action by the grand jury. ([Penal Code section 969a](#).)

#### Suitable Cases

Any deputy district attorney desiring to present a criminal matter to the grand jury should schedule the matter with the assistant district attorney responsible for coordination of the grand jury after consultation with his or her own assistant district attorney. The final decision whether to proceed by the indictment process will be determined by the assistant district attorney having subject matter responsibility.

#### Presentation

All presentations to the grand jury should be well prepared. Attorneys should review *The Criminal Grand Jury - A Guide to Prosecution by Indictment* before making the presentation. A copy of this guide may be obtained from the grand jury coordinator. Attorneys should also review Chapters VI and VII of *Professionalism*, the CDAA sourcebook for prosecutors. A copy of the sourcebook may be obtained from the assistant district attorney responsible for training and development.

In some matters, an offer to a prospective defendant to testify before the grand jury may be warranted. ([Section 939.7](#)) Grand jury indictments should be carefully drafted since amendment of an indictment is significantly limited compared with the amendment of an information. ([Penal Code section 1009](#).)

#### Duty to Disclose Exculpatory Evidence

Statutory and case law require that the prosecuting attorney make known to the grand jury any exculpatory evidence and the grand jury's duty in that regard under [Penal Code section 939.71](#) and [Penal Code section 939.7](#). (See *Johnson v. Superior Court* (1975) 15 Cal.3d 248, 255; *People v. McAlister* (1976) 54 Cal.App.3d 918.)

#### Secrecy

Grand jury hearings are conducted in secret<sup>[1]</sup>. (See [Penal Code sections 924.2](#) and [939](#)) unless a public hearing is ordered. ([Penal Code section 939.1](#)) It is a misdemeanor for a grand juror to disclose the fact of an indictment prior to the arrest of the defendant, ([Penal Code sections 924](#).) or to disclose any of the testimony presented to the grand jury unless ordered to do so by the court. ([Penal Code section 924.1](#)) As a matter of policy this office will not to disclose grand jury testimony except as required by applicable discovery law.

At the time of the defendant's arrest, the fact of an indictment may be disclosed. After the filing of the grand jury transcript with the clerk of the superior court and ten (10) days after service of the transcript upon the defendant or his/her attorney, the testimony presented becomes public record unless the court orders otherwise. ([Penal Code section 938.1](#).)



# SCCDA Policy and Procedure Manual

## Section 5.02(b)(xiv)6) Role of the Prosecutor at Trial

### Article V

### PROCEDURAL RESPONSIBILITIES

#### Section 5.02(b)(xiv)6)

#### Role of the Prosecutor at Trial

##### Policy

It is the duty of the prosecuting attorney to present to the court or jury relevant evidence bearing upon the truth of the charge in a forthright and candid manner. All dealings with the court and counsel must be truthful and honest. A prosecutor must not seek to mislead the court or any judicial officer by scheme or false statement of fact. The prosecutor must be impartial in making decisions and uninfluenced by personal bias regarding the accused or the victim. The prosecutor's commitment to due process requires the disclosure of exculpatory evidence when discovered even when discovery occurs after the determination of guilt. (See [section 5.02\(a\)\(ii\)](#), (Discovery Policy); [section 5.01\(a\)\(ii\)](#), (Mission and Honesty Policy).)

A prosecutor's conduct with members of the bench and opposing counsel shall be professional. That conduct must be characterized by personal courtesy, respect and professional and personal integrity. (See [sections 5.01\(b\)\(ii\)4](#), (Conduct with Members of the Bar); and [5.01\(b\)\(ii\)5](#), (Conduct with the Court and Staff); [section 5.01\(a\)\(ii\)](#), (Mission and Honesty).)

##### County Code of Ethical Conduct

Adherence to the [Rules of Professional Conduct of the State Bar of California](#) is mandatory. The CDAA sourcebook, "Professionalism" should be used as a guide. All attorneys should be familiar with the *Rules of Professional Conduct* and the *Canons of Professional Ethics* of the American Bar Association. The District Attorney is a signatory of the [Santa Clara County Bar Association's Code of Professionalism](#); attorneys in this office are to adhere to that Code.

Last Modified on Monday, 23 October 2006 05:30



# SCCDA Policy and Procedure Manual

## Section 5.03(c) Confidential Informants



### Article V

### MISCELLANEOUS PROCEDURES

#### Section 5.03(c)

#### Confidential Informants

##### Policy and Procedure

All issues and requests regarding confidential informants shall be directed to Assistant District Attorney David Tomkins or Assistant District Attorney David Howe. A deputy district attorney shall not offer or allow investigating law enforcement officers to offer immunity to a witness in exchange for informant duties. The law enforcement officers must be directed to the appropriate assistant district attorney. If asked by an officer to approve immunity for a witness, or suspect/defendant, the deputy must promptly notify his or her assistant district attorney of the request.

A law enforcement officer may ask an attorney in this office to make certain concessions regarding a defendant, e.g.: to agree to change custody status (lower bail, agree to OR, etc.); delay issuing a complaint; continue a court proceeding date; waive preliminary hearing; reduce or amend charges; alter a sentencing recommendation; or seek modification of the terms of probation or sentence. No deputy district attorney shall accede to any such request(s) except in accordance with this procedure, that is, obtaining approval from the designated assistant district attorney.

These issues and others similar to them shall be handled as confidential informant issues. Unless you are directed by an assistant to change procedure, continue to prosecute the case as if the request had never been made. Do NOT leave a note in the file regarding the discussion had with the officer. The district attorney's files are official records and may be the subject of a subpoena. Some attorneys share the files freely with counsel and the court. Carelessness in this regard may subject the potential informant to a risk of harm. (See [section 5.01\(a\)\(v\)2](#), (Duty to Warn).)

It is the responsibility of any attorney who discovers a note in a file regarding a confidential informant, to remove the note and bring it to the immediate attention of the appropriate assistant district attorney or the chief assistant district attorney.

##### Jailhouse Informant

For purposes of this policy, a jailhouse informant is a person in custody who purportedly receives a communication from another person in custody about a crime committed by the latter and who chooses to convey this information to authorities.

Jailhouse informants are to be presumed unreliable and their use is disfavored by this office.

A deputy district attorney wishing to use a jailhouse informant as a prosecution witness must obtain prior approval of Assistant District Attorney David Tomkins, and the deputy shall first read and absorb, Trott, WORDS OF WARNING FOR PROSECUTORS USING CRIMINALS AS WITNESSES (1996) 47 Hastings L.J. 1381. (Go to "L" Drive-"Training Materials" and click on 47 Hastings LJ 1381)

Assistant D.A. Tomkins shall maintain a Central Index of jailhouse informants who have offered to be, or who have been used as witnesses.

Use of jailhouse informants is also controlled by [Penal Code section 1127a](#).

Subsection (c) provides in part: "When the prosecution calls an in-custody informant as a witness in any criminal trial, contemporaneous with the calling of that witness, the prosecution shall file with the court a written statement setting out any and all consideration promised to or received by the in-custody informant." The statement may not in any way "expand or limit" the defendant's discovery rights. The statement must be provided to the defendant prior to trial. ([Penal Code section 1127a\(c\)](#).) The deputy district attorney should probe both law enforcement and the informant to determine if any "side deals" were suggested or made.

The victim of the crime committed by an in-custody informant must be notified of any proposed reduction or modification of sentence or dismissal of the case prior to trial, if known or before the informant is called to testify. ([Penal Code section 1191.25](#).)

Attorneys should also review [Penal Code sections 4001.1](#) (Although Penal Code section 4001.1, if strictly applied, pertains only to "in-custody informants" held within a "correctional institution," it is office policy that its provisions apply to any custodial setting), [701.5](#) and [Evidence Code sections 915, 1040, 1041](#), and Chapter VI of Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors. (That chapter of this CDAA publication was written by attorneys in this office.)

Whenever practicable, all substantive conversations between a jailhouse informant and an investigator or deputy or assistant district attorney shall be recorded.

##### Prohibition of Monetary Payments

Penal Code section 4001.1 prohibits law enforcement from making monetary payments to in-custody informants in excess of \$50 in exchange for testimony. This limitation does not apply to funds expended for witness protection, relocation, or travel expenses.

##### Fabrication of Evidence By Jailhouse Informants



# SCCDA Policy and Procedure Manual

## Section 7.04(a) Procedure for Departing Attorneys



### Article VII

### ADMINISTRATIVE POLICIES AND PROCEDURES

#### Section 7.04(a)

#### Procedure for Departing Attorneys

##### Policy and Procedure

##### 1. Separation Documentation and Exit Interview

Before the last workday, the departing attorney needs to contact DA Personnel and complete the necessary paperwork for separation of employment with the County and this office. The attorney should arrange for any continuation of benefits at this time also.

The attorney may arrange for an exit interview with his or her assistant district attorney or with the chief assistant district attorney. Make an appointment with the appropriate secretary for this interview.

##### 2. Personal Property

It is the attorney's responsibility to pack and move all personally owned property. For this purpose Business Services supplies used boxes, if available. The facilities assistants will also lend a dolly or other items to load personal property into the employee's vehicle. Plan to move all personal property before the close of business [5:00 PM] on the final day with the office.

##### 3. Office Property

The attorney must return the following items to his or her assistant district attorney on or before close of business (unless s/he is scheduled to leave earlier in the day) of the final day in the office.

Do not redistribute the items of property listed above to other members of the office. Leave them in your office.

Computer files shall not be downloaded and taken from the office. Writings, drawing and other items created on the office computer(s) or network remain the property of the office and shall not be removed from office. Computer files shall not be obscured or rendered inaccessible by password or other device. **See section 7.01 (Technology Resource Policy)**

The assistant district attorney will review with you all items to ensure their return before notifying Personnel to process your final paycheck. This policy is for your protection and as well as that of the office.

##### After Departure

Access to the office after departure will be as a member of the public. Visits to the office for personal or business purposes will be conducted as a member of the public. Contact the receptionist and wait in the lobby until you are escorted into the interior of the office.

After close of business on the final work day and thereafter, the departing attorney is not permitted to use pass codes or access codes to enter any district attorney facility, hallway or interior office, voicemail, computer, computer network, or Internet account. [Chapter XIII \(Transition To or From the Prosecutor's Office\)](#), of *Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors* regarding the ethical pitfalls a former prosecutor might encounter should be reviewed before leaving the office.